U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: NOV 2 7 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, (director) revoked the approval of the employment-based immigrant visa petition. The director granted a subsequent motion to reopen and reconsider the revocation. The director affirmed his previous decision revoking the approval of the petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes its business as the "procurement of chemicals." It seeks to permanently employ the beneficiary in the United States as an environmental compliance inspector. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

At issue in this case is whether a *bona fide* job opportunity exists, as required by the requested preference classification.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[1] The priority date of the petition is June 20, 2012.[2]

The director revoked the approval of the petition. The director reviewed the matter again on motion to reopen and reconsider and affirmed his previous decision to revoke the approval of the petition. The director determined that the petitioner had not established that a *bona fide* job opportunity exists; the director based his decision on numerous discrepancies contained in the record of proceedings, namely:

- The director detailed evidence that the address claimed as the petitioner's "Principal Business Office" is merely a virtual office space, whose rent is paid for by the beneficiary, himself.
- The director pointed out that while evidence submitted by the petitioner now suggests that the beneficiary has been employed by the petitioner since at least February 29, 2012, this evidence contradicts the fact that the beneficiary did not claim any employment for the petitioner on the labor certification and, in fact, testified that he was a full-time employee of the [redacted] through September 18, 2012.
- The director noted that the petitioner's submission of evidence asserting that the beneficiary has been employed as its operations manager raised questions of whether the petitioner maintained a continuing intent to permanently employ the beneficiary

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[1] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).
[2] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

as an environmental compliance inspector, the position offered on the labor certification.

The director determined that the petitioner had failed to resolve the inconsistencies in the record by independent objective evidence.[3] Therefore, the director affirmed his earlier decision to revoke the approval of the petition.

The petitioner's appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.[4] The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[5] A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.[6]

II. LAW AND ANALYSIS

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).

In this case, the evidence submitted into the record of proceedings by the petitioner contains several discrepancies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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[3] It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[4] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[5] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[6] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

The petitioner stated on the labor certification that the beneficiary's "primary worksite" would be at California. However, a lease agreement submitted by the petitioner reveals that this office is a ' virtual office and that the monthly rent was paid by the beneficiary, himself. The petitioner submitted a photograph of the office directory for the building located at it is noted that the directory reveals the names of numerous businesses that share this same office suite. The photo purportedly showing the entrance to the office shows no company sign, logo or other identifying information. The photo shows no employees or work space. The petitioner also submitted a copy of its "Seller's Permit" issued by the State of California.

On appeal, counsel asserts that the seller's permit proved that the business was operating out of its office at However, the permit simply establishes that the petitioner was authorized to conduct business there, not that actual business was being conducted or that a physical office space even existed.

Counsel also asserts on appeal that the existence of the petitioner's office was verified by the photographs of the office space and of the building directory that had been submitted by the petitioner. However, counsel did not address the fact that none of the photographs of the office space reveal any indication that the space being photographed is utilized by the beneficiary to conduct its business. Furthermore, counsel does not explain the revelation from the photograph of the business directory that multiple businesses claimed the same office space.

Finally, counsel contested the director's statement that the petitioner's claimed principal place of business is "nothing more than an Counsel dismissed the director's statement as "incorrect." However, the director's characterization is consistent with the evidence submitted by the petitioner. The petitioner submits no new evidence on appeal to counter the director's characterization.

The petitioner submitted a copy of a lease for a ' The petitioner submitted photographs revealing that multiple businesses are simultaneously claiming use of the same office space. The petitioner was advised of the need to submit independent, objective evidence that it was actually doing business at this address as claimed on the labor certification; however, the only response has been attestations from counsel that the petitioner really was doing business there. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Another contradiction in the record of proceedings relates to the claimed employment experience of the beneficiary. On the labor certification the beneficiary claimed only one place of employment; he stated that he worked for the from July 1, 2010, through his signing of the form on September 12, 2012. On a subsequent Form G-325A, Biographic Information, the beneficiary indicated that he was still working for the when he signed the form on April 18, 2013. In her April 29, 2013, response to the

director's Notice of Intent to Revoke counsel confirmed that the beneficiary had worked for the since July 2010. However, bank records submitted by the petitioner suggest the beneficiary was working for the petitioner as early as February 29, 2012. In addition, the petitioner submitted copies of its 2012 Internal Revenue Service (IRA) Forms 941, Employer's Quarterly Federal Tax Return, which reveal one employee; counsel asserts in her June 21, 2013, brief that this one employee was the beneficiary. On appeal, counsel explains that the beneficiary did not claim his work for the petitioner because he has been working as a part-time employee. However, the Form G-325 requested the beneficiary to list his employment from the "last five years" and the labor certification specifically requires the beneficiary to "List all jobs the alien has held during the past 3 years." Counsel has failed to provide any persuasive argument for ignoring the express directions of the labor certification and the Form G-325A by listing only some of the beneficiary's past employment.

The director questioned the petitioner's continuing intent to permanently employ the beneficiary as an environmental compliance inspector, the position offered on the labor certification. On appeal, counsel reaffirmed the petitioner's intention to employ the beneficiary as detailed on the labor certification. No evidence to support counsel's assertion was submitted. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

III. CONCLUSION

In summary, the petitioner failed to establish that a valid employment relationship exists, and that a *bona fide* job opportunity is available to U.S. workers. While counsel asserts on appeal that the inconsistencies cited by the director "have been fully explained by the Petitioner with documentary evidence and letters," contrary to counsel's conclusion, as detailed above the evidence submitted by the petitioner is actually the source of the inconsistencies, not their resolution. Therefore, the beneficiary does not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The director's decision revoking the approval of the petition is affirmed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition remains revoked.